SIERRA CLUB
THE MONO LAKE COMMITTEE
(ON RECONSIDERATION)

IBLA 83-543 Decided December 19, 1984

Motion for reconsideration of the Board's decision in Sierra Club, 79 IBLA 240 (1984), setting aside a decision of the California State Office, Bureau of Land Management, dismissing protest of a decision to lease competitively certain lands in the Mono-Long Valley, Mono County, California, for geothermal steam and associated resources. CA 12705.

Motion granted; Board decision set aside; California State Office decision affirmed.

1. Appeals -- Rules of Practice: Appeals: Reconsideration

   Where the Interior Board of Land Appeals sets aside a BLM decision because on appeal the appellant has pointed out ambiguities and inconsistencies in the record and BLM does not come forward to clarify them, the Board ordinarily will not entertain a postdecision brief seeking reconsideration and setting forth such clarification.

2. Geothermal Leases: Environmental Protection: Generally -- National Environmental Policy Act of 1969: Environmental Statements

   Where BLM has adopted staged leasing by notifying potential geothermal lessees that all postlease plans for exploration and development are subject to site specific environmental review and that development might be limited or denied if such reviews were to disclose that unacceptable impacts on other land uses or resources would result, it is not necessary to prepare an environmental impact statement prior to leasing.

APPEARANCES: Lynn M. Cox, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Betsy Dodd, Esq., and Julie E. McDonald, Esq., Sierra Club Legal Defense Fund, Inc., San Francisco, California, for Sierra Club and the Mono Lake Committee.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On March 1, 1984, the Board issued Sierra Club, 79 IBLA 240 (1984), which set aside a California State Office, Bureau of Land Management (BLM),

decision dismissing a protest filed by Sierra Club and the Mono Lake Committee to a BLM decision to lease competitively for geothermal exploration and development 85,000 acres of public land in the Mono-Long Valley Known Geothermal Resource Area (KGRA) in California. The Board remanded the case to BLM. In our decision in Sierra Club we set forth the arguments of appellants and indicated that our review of the record revealed inconsistencies and ambiguities which were not clarified by BLM on appeal. 1/ Thus, we stated at page 249:

> Instruction Memorandum No. 80-198 directed the inclusion of a "conditional stipulation" in a staged lease situation. 13/ In this case the notice to lease contained language that arguably conditioned leasing on subsequent environmental reviews. The notice, however, did not contain a conditional stipulation. Thus, because BLM has adopted staged leasing for the Mono-Long Valley KGRA, but it has not included a conditional stipulation in its notice to lease and its intent with respect to use and development of a lease is unclear from the record, we must set aside the BLM protest decision and remand the case to allow BLM to clarify its intent with respect to leasing in the Mono-Long Valley KGRA.
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> 13/ Although the instruction memorandum contains an expiration date of Nov. 30, 1981, since BLM cited it in its Mar. 21, 1983, protest decision as a partial basis for its action in this case, we must assume that the effectiveness of the memorandum was extended beyond the expiration date.

We concluded at page 250 concerning categorical exclusions:

> Most troublesome, herein, is exclusion number 7. Excluding the approval of a plan of operation for geothermal exploration or development when an environmental document (an EA in this case) has been prepared at the leasing stage would undercut completely the rationale for the staged leasing concept for geothermal leasing in this case. The justification for not preparing an EIS at the leasing stage in this case was that sufficient environmental reviews would be undertaken at subsequent stages. However, now the Department has established a categorical exclusion for plan of operation approval. This inconsistency should be addressed on remand.

And with regard to compliance with the National Historic Preservation Act, (NHPA), 16 U.S.C. § 470-47011 (1982), we stated at pages 250-51:

> Appellants have also charged that BLM failed to comply with the National Historic Preservation Act. The EA Decision

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1/ In this regard, our reference to failure to clarify was directed at BLM's failure to answer on appeal any of the charges contained in appellants' statement of reasons which had focused our attention on certain ambiguities in the record.

> Record includes sections on pages 4 and 5 relating to cultural resources. The thrust of those sections and the responses given by BLM in its protest decision to specific charges by appellants is that BLM will comply with that Act at the appropriate time. BLM believes that it is not necessary to comply fully with the requirements of 36 CFR Part 800 at the initial leasing stage. Such an approach would not appear to be unreasonable in a staged leasing situation. However, since we are remanding this case so that BLM may clearly express its position with respect to this proposed sale, BLM should also set forth, so that potential lessees are fully aware, the cultural resource ramifications of leasing. [Footnote omitted.]

On July 30, 1984, counsel for BLM filed a document with the Board styled "Response to Board's Request for Clarification and Motion for Reconsideration." Therein, counsel explained BLM's position with regard to the three issues mentioned above and asked that we reconsider our decision in light of the response. On September 20, 1984, Sierra Club and the Mono Lake Committee (hereinafter Sierra Club) filed an opposition to the motion for reconsideration, and on October 29, 1984, BLM filed a reply to this opposition.

[1] In issuing our decision in Sierra Club calling for clarification of BLM's position, we did not mean to elicit from BLM a postdecision brief to the Board explaining its position. Our decision meant that on the record before us we were unable to affirm, reverse, or take other action because of unexplained ambiguities. We did not intend, however, that our decision should be considered as an invitation to prolong the appellate process before the Board. Our intent in setting aside the BLM decision was that BLM would again address appellants' protest and, therein, explain and clarify its position regarding the three issues. If they were not satisfied with that decision, they could then again appeal to the Board.

BLM, however, has filed its clarification with the Board. Sierra Club finds this "clarification" to be completely inadequate. Merely to deny BLM's request and motion without comment would not further the resolution of this dispute. Therefore, under the circumstances of this case we grant BLM's motion for reconsideration.

In its clarification BLM states that "[m]uch, if not all, of this confusion [uncertainty over BLM's intent regarding postlease development rights] is due to BLM's unfortunate reference to an expired instruction memorandum [Instruction Memorandum (I.M.) 80-198] in its protest decisions" (Response and Motion at 2). BLM asserts the governing language is that found in the conditional development notice included in the environmental assessment (EA) and in the notice of sale as notice to lessee No. 6. 2/ The notice reads:

> The lessee, in accepting this lease, understands that the surface management agency has reviewed existing information and planning

2/ BLM now states that I.M. 80-198 was superseded by I.M. 82-64, dated Nov. 5, 1981, and I.M. 82-64, Change 1, dated Aug. 23, 1982, and by the language of the conditional development notice.

> documents and except as otherwise noted in special stipulations, knows of no reason why normal development cannot proceed on the leased lands. However, specific development activities could not be considered prior to lease issuance since the nature and extent of the geothermal resource were not known and specific operations have not been proposed. The lessee is hereby made aware that, consistent with 30 C.F.R. 270.12, 3/ all post-lease operations will be subject to appropriate environmental review and may be limited or denied, but only if unmitigable and unacceptable impacts on other land uses or resources would result.

BLM contends that the clear impact of this language is to alert potential geothermal lessees that all postlease plans for exploration and development will be subject to site-specific environmental review and that development may be limited or denied if such reviews disclose that unacceptable impacts will result. BLM states that in a competitive sale situation a potential lessee is bound by the terms of the notice of sale.

In response to BLM's statements, Sierra Club points out that confusion over whether or not staged leasing had been initiated did not rest only with the expired instruction memorandum but that the EA itself contains conflicting statements. Also, Sierra Club states that I.M. 82-64 and I.M. 82-64, Change 1, contain inconsistent language regarding staged leasing.

Sierra Club is right that certain inconsistencies exist in the language of the EA and the cited I.M.'s. However, BLM's intent with regard to leasing in the Mono-Long Valley KGRA is now clear. The governing language is that in the conditional development notice, quoted supra. BLM notified the potential lessees in its notice of sale that development would be subject to limitation or even denial if subsequent environmental reviews disclosed that unacceptable impacts would result. BLM correctly points out that a potential lessee by submitting a bid agrees to the conditions of sale, such as the conditional development notice. Sierra Club urges, however, that BLM give express notice in the lease, in the form of a stipulation, of the limited nature of rights conveyed.

Clearly, such a stipulation would be desirable to ensure that the lessee understands and accepts the conditional development restriction; however, we cannot find that such a stipulation is legally required in this case since the conditional development notice was included in the notice of sale and thus, the potential lessee consented to it as part of the terms of sale. See 43 CFR 3220.3; Emery Energy, Inc., 64 IBLA 285 (1982). 4/

3/ 30 CFR 270.12 (1982) governed geothermal resource operations. The regulations relating to geothermal resource operations have been expanded and are now found in 43 CFR Part 3260.

4/ We note that the case file contains a copy of a memorandum from the California State Director, BLM, to the Regional Solicitor, Pacific Southwest Region, dated July 5, 1984, in which the State Director identifies the conditional development notice as a stipulation "which will be incorporated in and made a part of each lease issued."

We find that BLM in this case properly provided for conditional development of the lease specifying that development would be limited or denied if site-specific environmental reviews disclosed that unacceptable impacts would result. For that reason, preparation of an environmental impact statement (EIS) prior to leasing is not necessary.

With regard to the categorical exclusions, BLM asserts that all postlease operations will receive environmental review prior to approval. BLM states:

> Exclusions (7) and (9) would clearly be inapplicable to any postlease approval of plans of operations undertaken pursuant to leases issued as a result of this sale. The exclusions are limited to situations where the specific plan of operations has been subjected to prior environmental review. Under the staged environmental review procedure adopted for the Mono-Long Valley lease sale, by definition, review of such plans has not been completed. In accordance with 43 C.F.R. § 3261.3, such review will take place at the time a plan of operations is submitted to the Bureau for approval. [Emphasis in original.]

(Response and Motion at 5-6).

After setting forth its procedures for review of plans of operations submitted for various activities, BLM concludes:

> The above discussion clarifies that the Bureau pursuant to the staged leasing process adopted for this sale, will complete an environmental review of all plans of exploration and development submitted by a lessee prior to approval of the activities covered by the plan. If unacceptable or unmitigable impacts would result, the Bureau has retained through the notice to the lessee, authority to deny those activities, and, ultimately, development of the lease.

(Response and Motion at 7).

Sierra Club, in response, argues that BLM has failed adequately to address the discrepancies between the categorical exclusions and the statements in the lease sale notice and EA that all postlease operations will be subject to environmental review. Sierra Club's argument is based on the language of the exclusions.

We find that BLM has clarified the ambiguity that existed between the categorical exclusion language and the language in the EA and sale notice. BLM specifically states that it "will not approve a plan of operations for exploration or development submitted for lands leased under Lease Sale 12705 on the basis of categorical exclusion (7)" (Reply at 4; Correction to Reply at 1). It further points out that exclusion of plans for intensive exploration and development from the general regulatory requirement to prepare an EA and/or EIS on all plans of operations on the basis of the prelease EA would be "improper" (Reply at 4).

Moreover, BLM states:

> As "interested parties" appellants will be notified by the Bureau of any and all plans of operations submitted as a result of Lease Sale 12705 and provided with an opportunity to participate in the environmental review process for each plan including a field inspection of the proposed site of operations. Appellants will also be offered an opportunity to review the plan of operations and comment in accordance with 43 C.F.R. 3262.4(k).

(Reply at 4).

In remanding this case to BLM for clarification of its position on staged leasing, we also noted that BLM should clearly set forth the cultural resource ramifications of leasing. In its Response and Motion, BLM states that there will be no such ramifications from leasing itself. BLM further states that it recognizes that postlease surface disturbances do have the potential to affect cultural resources.

Sierra Club admits in its opposition that if BLM retained the right to preclude all surface disturbing activities after lease issuance, "leasing at least arguably would not foreclose the alternative of avoidance of cultural resources" (Opposition at 7). Sierra Club's objection was that BLM had not made such a commitment. As stated, supra, BLM has, in fact, reserved the authority to deny postlease operations. 5/

In our March 1 decision we indicated that a potential lessee should be put on specific notice regarding the fact that BLM's legal responsibilities relating to the cultural resources program might be time consuming and result in operational delays to the lessee. Sierra Club argues that BLM has failed to give this specific notice in this case. BLM, on the other hand, argues that such notice is provided "through Special Stipulation No. 1 attached to the sales notice. Section 18 of the standard lease form, as well as § 7 of GRO-4 [Geothermal Resource Operational Order No. 4], also addresses the lessee's and Bureau's cultural resource protection responsibilities" (Response and Motion at 9).

While we believe that a more definite statement in the sale notice of the possible effect of BLM's cultural resource responsibilities would be desirable from a lessee's standpoint, we recognize that in this case the lease sale has taken place and the successful bidder has been served with copies of pleadings in this case so that it is clearly on notice of BLM's obligations.

5/ In its opposition, Sierra Club asserts that, in order to comply with the NHPA, BLM should specifically provide that surface disturbance could be denied in order to protect cultural resources. Sierra Club does not cite any specific section of the NHPA that would require such specificity, nor are we able to find any. BLM's authority to limit or deny unmitigable and unacceptable impacts should be sufficient to cover the situation described by Sierra Club.

Accordingly, for the above stated reasons and pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we set aside our March 1, 1984, decision and affirm the BLM decision denying the protest.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge